BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WIRELESS TELECOMMUNICATIONS BUREAU AND
WIRELINE COMPETITION BUREAU

In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment WIA Petition for Rulemaking, WIA Petition for Declaratory Ruling, and CTIA Petition for Declaratory Ruling	WT Docket No.: 19-250 WC Docket No.: 17-84 RM -11849

REPLY COMMENTS OF THE ELECTRIC UTILITIES IN OPPOSITION TO CTIA'S PETITION FOR DECLARATORY RULING ON POLE ATTACHMENT ISSUES

Filed by:

Ameren Service Corporation
American Electric Power Service Corporation
Duke Energy Corporation
Entergy Corporation
Oncor Electric Delivery Company LLC
Southern Company
Tampa Electric Company

Eric B. Langley
Robin F. Bromberg
R. Rylee Zalanka
LANGLEY & BROMBERG LLC
2700 U.S. Highway 280, Suite 240E
Birmingham, Alabama 35223
Telephone: (205)783-5750
Email: eric@langleybromberg.com
robin@langleybromberg.com
rylee@langleybromberg.com

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EXECUTIVE SUMMARY

- No amount of pole attachment regulation will ever be enough for the attaching entities. Rather that devoting their resources to pursuing "innovative and mutually beneficial solutions" to deployment challenges, the attaching entities have come to believe that every challenge can and should be solved by government intervention (and in a way that is unilaterally beneficial to them). This is not a healthy ecosystem for meeting the deployment challenges of today and tomorrow.

- The attaching entities argue that the Commission can exercise jurisdiction over electric utility lighting assets because the term "pole" as used in Section 224 includes **all** poles owned by electric utilities. *Southern Company v. FCC*, which specifically held that transmission poles were **not** covered by Section 224, directly refutes this argument. Further, the holding in *Southern Company* was not, as alleged by some attaching entities, limited to interstate transmission assets. The court expressly observed that some transmission poles were, in fact, **intrastate** in nature.

- The *Southern Company* case also makes clear that the intended scope of Section 224 was a utility's "local distribution facilities." Though Crown Castle attempts to portray lighting assets as merely another type of distribution facility based on FERC accounting, at least one court has specifically rejected this argument because of the distinct purposes of distribution facilities (to move lower voltage electricity from substations to customers) and lighting assets (to provide light).

- More fundamentally, though, the attaching entities entirely neglect the pragmatic concerns attendant to lighting asset collocation—namely that the vast majority of lighting assets will require both asset replacement and careful coordination with the lighting customer (usually a city or other governmental entity). These are not problems that can be solved through regulation. They are challenges that will be made more **difficult**, if not insurmountable, with regulation.

- The attaching entities also argue for a "lowest common denominator" approach to electric distribution construction standards. The basic argument goes something like this: if any electric utility allows something under any circumstances, then every electric utility should allow it under all circumstances. This argument—which would actually force electric utilities into allowing fewer exceptions and adopting more restrictive access policies—stands in direct conflict with the Commission's long-standing support for a utility's individual standards.

- The attaching entities further allege that they are entitled to pole access unencumbered by any standards at all, and that any restrictions on access must be articulated on a case by case basis. This approach would be entirely inconsistent with the careful, standards-based engineering that goes into the construction and maintenance of an electric distribution system. But if that isn't enough, this "standards-free" approach would actually slow deployment because the application process would become remarkably inefficient without standards that establish parameters on the front end.

- Finally, the attaching entities ask the Commission to "clarify" that parties to a pole license agreement cannot implement "innovative and mutually beneficial solutions" that in any way conflict with the Commission's rules. The fact that attaching entities believe this would be a mere "clarification," rather than a 180-degree reversal of longstanding Commission policy, speaks volumes about the practical prospects of implementing this "clarification" even if the Commission were to grant it.
- CTIA's petition, and the comments in support of the petition, are more of the same: more regulation is the answer. Some of the attaching entities have even gone so far as to misstate the law and distort the issues in their zeal for more regulation. The Commission should deny and dismiss CTIA's petition, at least as it relates to the Section 224 issues. If the Commission takes any action at all, it should consider rolling back existing pole attachment regulations that are choking the ecosystem and making the attaching entities dependent on government favor. Deployment of the next generation of advanced communications facilities depends upon it.

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REPLY COMMENTS OF THE ELECTRIC UTILITIES
IN OPPOSITION TO CTIA'S PETITION FOR DECLARATORY RULING
ON POLE ATTACHMENT ISSUES

Ameren Service Company, American Electric Power Service Corporation, Duke Energy Corporation, Entergy Corporation, Oncor Electric Delivery Company LLC, Southern Company and Tampa Electric Company (collectively the "Electric Utilities") respectfully submit the following reply comments in connection with the pole attachment issues raised in CTIA's Petition for Declaratory Ruling in the above-referenced docket.[1] For the reasons set forth below, the Commission should deny and dismiss CTIA's petition, at least insofar as it relates to the Section 224 issues.

[1] Wireless Telecommunications Bureau and Wireline Competition Bureau Seek Comment on WIA Petition for Rulemaking, WIA Petition for Declaratory Ruling and CTIA Petition for Declaratory Ruling, Public Notice, WT Docket No. 19-250, WC Docket No. 17-84, RM-11849, DA 19-913 (released Sept. 13, 2019).

I. NO COMMENTER PRESENTED A COMPELLING LEGAL OR PRACTICAL BASIS FOR THE COMMISSION TO EXERCISE JURISDICTION OVER INVESTOR-OWNED UTILITY LIGHTING ASSETS.

A. *Southern Company v. FCC* Directly Contradicts the Jurisdictional Argument Made by Numerous Wireless Interests in Their Initial Comments.

Nearly every wireless commenter included some version of the following oversimplified argument in their initial comments: because a "light pole" is a "pole" and because Section 224 covers all "poles" owned or controlled by a utility, then Section 224 covers "light poles" owned or controlled by a utility. *See* Wireless Infrastructure Association ("WIA") Cmts. at 12-13; Verizon Cmts. at 3-4; T-Mobile Cmts. at 22-23; ACA Connects Cmts. at 2-4; AT&T Cmts. at 23-25; Crown Castle Cmts. at 40-41; ExteNet Cmts. at 5-6. The validity of this syllogism, of course, depends upon the validity of its premises. *Southern Company v. FCC* directly and plainly invalidates the second premise (that Section 224 covers all "poles" owned or controlled by a utility). *S. Co. v. FCC*, 293 F.3d 1338, 1344-45 (11th Cir. 2002). Though the stakeholders might fairly dispute the legal import of the *Southern Company* case, no stakeholder can credibly dispute the central holding of *Southern Company*: that transmission poles fall outside the coverage of Section 224. *See id*. This, alone, means that Section 224 does not cover **all** poles owned or controlled by a utility, and it means that the primary jurisdictional argument advanced by the wireless interests fails as a matter of law and logic.

This is not to say that *Southern Company* squarely addresses the issue of whether posts, poles, standards and other structures used primarily to support street and outdoor area lighting are "poles" for purposes of Section 224. The Electric Utilities are not contending that *Southern Company* expressly addressed this issue. Instead, the Electric Utilities rely upon *Southern Company* for three critical and informative propositions:

- Section 224 does not cover "all" poles (i.e. at a minimum, it does not cover transmission poles);
- Congress intended Section 224 to be limited to a utility's "local distribution facilities"; and
- the underlying purpose of the facilities matters in determining whether Section 224 applies.

The best indication that CTIA and other wireless interests know that *Southern Company* is an obstacle to their jurisdictional argument is the fact that CTIA attempted to preemptively defuse the case in its petition. CTIA Pet. at 24-25. Nevertheless, some attaching entity commenters take the unusual position that the *Southern Company* case actually supports the Commission's exercise of jurisdiction over an electric utility's lighting assets. For example, T-Mobile contends *Southern Company* held that "Congress intended to grant access rights to all of a utility's poles." T-Mobile Cmts. at 23 n.89. AT&T similarly argues *Southern Company* "unequivocally held that Section 224 covers *all* poles owned or controlled by the utility." AT&T Cmts. at 25 (emphasis in original). These assertions are not merely zealous advocacy or an aggressive interpretation of case law: **they are incorrect statements of the law**. Given that *Southern Company* is the only case, to wit, that addresses the scope of a utility's assets covered by Section 224, these misstatements are no small matter.

Crown Castle and Verizon, to their credit, take a more nuanced—although equally incorrect—approach to *Southern Company.* Verizon argues that *Southern Company* "held only that interstate transmission towers, which are regulated by the [FERC], are not 'poles' within the meaning of Section 224." Verizon Cmts. at 5. Crown Castle contends that the holding in *Southern Company* "was based on the fact that transmission towers are interstate in nature rather than local." Crown Castle Cmts. at 40. Though the interstate nature of certain transmission facilities was undoubtedly a factor in the court's analysis, it was not the determining factor for at least two reasons. First, as recognized by the court, "[n]ot all transmission facilities necessarily entail

interstate transmission of energy." *S. Co.*, 293 F.3d at 1344. In fact, the Commission argued (unsuccessfully) in *Southern Company* that the intrastate nature of some transmission poles weighed against an exclusion of such facilities from Section 224. *Id*. Second, the court made clear that the mere presence of transmission lines on a distribution pole did not necessarily exempt such a pole from Section 224: "These local distribution facilities, festooned as they may be with transmission wires, are plainly within the FCC's jurisdiction under the terms of the Act." *Id*. at 1345. In doing so, the court created something akin to a "primary purpose" test: is the primary purpose of the asset "local distribution" (in which case the asset falls within Section 224) or is it something else?

Importantly, here, the Electric Utilities are not contending that distribution poles "festooned" with streetlights are outside Section 224. The Electric Utilities concede that these are distribution poles within the Commission's pole attachment jurisdiction.[2] The Electric Utilities contend only that posts, poles, standards and other structures used primarily to support street and outdoor area lighting are not the "local distribution facilities" covered by Section 224. Notably, none of the attaching entities addressed an important aspect of the *Southern Company* case: the fact that "the primary physical unit responsible for carrying transmission wire—towers—are notably absent from the definition of 'pole attachment.'" *Id*. at 1344. As noted in our initial comments, two of the primary physical units responsible for supporting street and outdoor area lighting—posts and standards—are "notably absent from the definition of 'pole attachment.'"

Crown Castle also argues:

> Under FERC regulations, streetlights are categorized within the 'distribution facilities' accounts rather than with "transmission facilities."…Under the Court's

[2] For this reason, AT&T's concern about the "absurd results" accompanied by a utility "unilaterally remov[ing] any pole from Section 224 simply by adding lighting features to the pole" is a phantom concern. AT&T Cmts. at 25.

> analysis in *Southern Company*, streetlight poles are local distribution facilities subject to the mandatory access obligations of Section 224(f)….

Crown Castle Cmts. at 41. Though *Southern Company* indeed defined the scope of Section 224 as "local distribution facilities," Crown Castle's characterization of lighting assets as "distribution facilities" based on FERC accounting is incorrect. In fact, **at least one court has specifically rejected the exact argument made by Crown Castle**.

In *PPL Corp. v. Commissioner of Internal Revenue*, the United States Tax Court was presented with the issue of the proper classification of street light assets for purposes of determining the appropriate depreciation deduction. 135 T.C. 176 (2010). The tax commissioner in that case argued that "the inclusion of street light assets in FERC accounts under the heading Distribution Plant is 'persuasive' that both the electric utility industry and FERC consider streetlights to be used 'primarily for distribution.'" *Id*. at 189. In rejecting the tax commissioner's argument, the court noted that the current organization of FERC accounting was nothing more "than an attempt to simplify the regulatory regime." *Id*. at 190. The court further noted that "[d]istribution is the process of moving lower voltage electricity from distribution substations to customers," and that "street light assets are 'primarily used' to make light, not to distribute electricity." *Id*. at 178, 192. In short, lighting assets are not distribution facilities. This isn't just an argument; it is a technical and legal fact. And, when paired with the holding in *Southern Company* that "the Act's coverage was intended to be limited to the utilities' local distribution facilities," it is dispositive of the issue raised in CTIA's petition. *S. Co.*, 293 F.3d at 1345.

B. As Noted by Numerous Commenters, Streetlight Collocation Requires Cooperation and a Complicated Balance of Interests that Cannot Be Achieved Through Regulation.

For all it appears, the wireless attaching entities have not even considered—let alone addressed—one of the fundamental practical challenges associated with streetlight collocation. As

set forth in our initial comments, and as echoed by other electric utility commenters, the vast majority of lighting support structures require replacement in order to support small cell and other wireless attachments. *See, e.g.,* Xcel Energy Cmts. at 6 ("[T]he vast majority of street light poles in Xcel Energy's service area do not have the structural capacity or capability to support wireless communications facilities. This means that in order to accommodate wireless colocation, the entire street light pole must be replaced…"); POWER Coalition Cmts. at 10 ("[Dedicated light pole structures] simply are not designed to support anything other than lighting, and thus lack the capacity to accommodate wireless communications attachments.").[3] It is easy to see why. Below are examples of existing streetlights in some of the metropolitan areas served by the Electric Utilities:

Figure 1: Georgia Power street light near downtown Atlanta, Georgia

Figure 2: Georgia Power area lighting in downtown Atlanta, Georgia

[3] AT&T also acknowledges this reality in its comments. After complaining that "three electric utilities operating in Texas refuse to allow AT&T to access light poles," AT&T further explains that each of these structures needed to be replaced with "a similar pole that would be used to support the needed small cell facilities." AT&T Cmts. at 22 & n.70.

Figure 3: Oncor Electric Delivery street light in downtown Dallas, Texas

Figure 4: Oncor Electric area lighting in downtown Dallas, Texas

Figure 5: Entergy area lighting in Baton Rouge, Louisiana

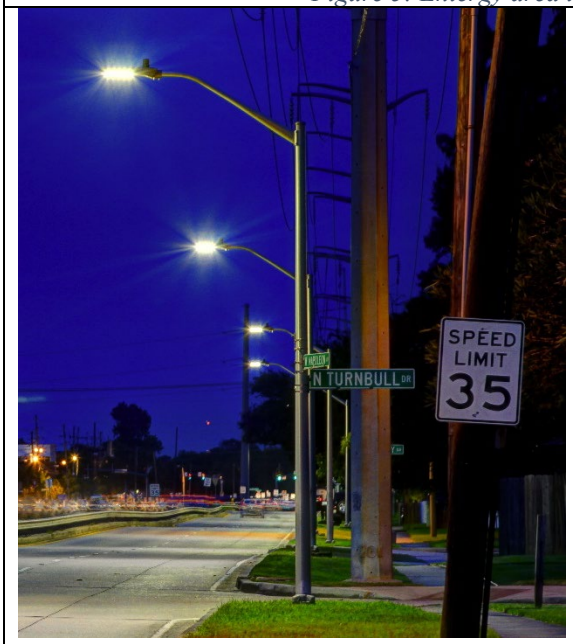

Figure 6: Entergy street light in Metarie, Louisiana

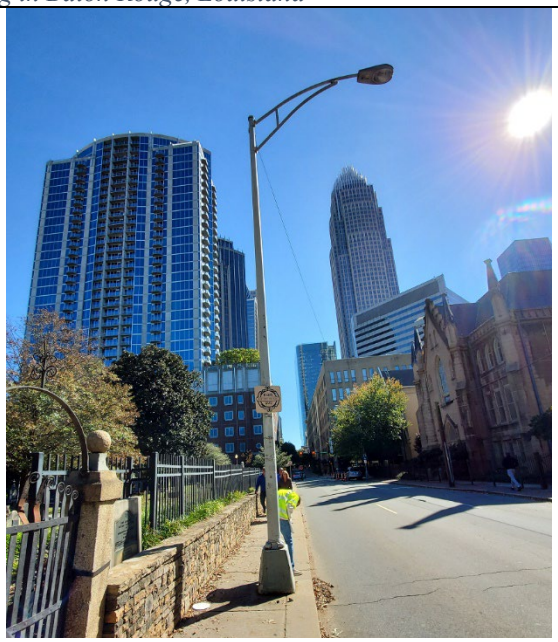

Figure 7: Duke Energy street light in downtown Charlotte, North Carolina

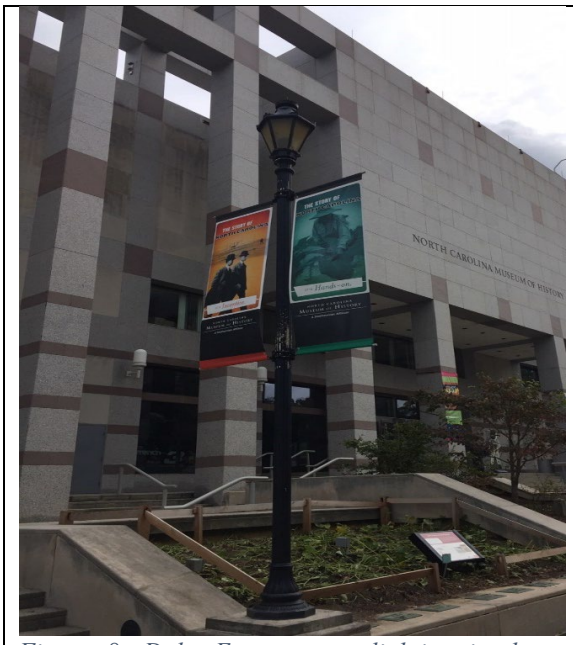

Figure 8: Duke Energy area lighting in downtown Raleigh, North Carolina

Without cooperation from, and incentive to, both the lighting customer and the utility, these structures cannot be replaced. As explained by numerous municipal commenters: "Requests in the petitions to allow for mandatory access to light poles on terms and conditions dictated by the federal government unravels carefully crafted work done at the local level with the agreement of both utilities and municipalities." Chevy Chase Village Cmts. at 2; Town of Kensington, Maryland Cmts. at 2. Similarly, the National Association of Telecommunications Officers and Advisors ("NATOA"), the US Conference of Mayors and the National Association of Counties stated:

> CTIA's proposal to expand Section 224 to apply to light poles has serious implications not contemplated in its Petition. Briefly, the issues related to placing wireless facilities and providing electricity to these sites are complex and create safety hazards for workers and the public that are different from attachments to standard utility poles. Further, municipalities often have contractual rights related to street lights, including the right to purchase or require removal of any poles, and obligations like maintenance costs and indemnification, that do not apply to standard utility poles.

NATOA Cmts. at 14. Even Crown Castle implicitly acknowledged some of these complications, as well as the need to work cooperatively on solutions: "Indeed, where wireless attachments to

utility-owned street light poles are permitted, Crown Caste has worked with utilities to develop shrouds that attach to the existing light poles and in some cases has even created replicas of the existing light poles that can accommodate radio and antenna attachments and blend in with existing infrastructure." Crown Castle Cmts. at 39.

If the Commission wants to promote collocation of wireless antennas on lighting support structures, the Commission should not attempt to do so through regulation that will undermine the level of cooperation necessary to achieve the end. The most the Commission should do is encourage stakeholders to work toward "innovative and mutually beneficial solutions" and reserve the right to revisit this issue in the future. *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd. 11864, 11908 at ¶ 107 (May 20, 2010) ("As the Commission has previously stated, we 'encourage, support and fully expect that mutually beneficial exchanges will take place between the utility and the attaching entity.' We want to promote efforts by attachers and utilities to negotiate innovative and mutually beneficial solutions to contested contract issues.").

Given these complications, the generic complaints raised by Verizon and Crown Castle regarding the rates, terms and conditions for lighting collocation lack both context and merit. Verizon complains about a "midwestern utility" that "requires" an annual fee of $500 and utilities in California that "have sought $1,500 or even as much as $6,000 per light-pole attachment." Verizon Cmts. at 5. Crown Castle alleges: "In the majority of instances where standalone streetlights are made available for communications attachments, availability is conditioned upon fees and terms that significantly exceed the regulated rate and may undermine the feasibility of using these poles for telecommunications attachments." Crown Castle Cmts. at 39. Verizon and

Crown Castle, of course, omit any description of the other terms and conditions proposed by the unnamed utilities (which would, of course, have a bearing on the fairness of the proposed rates). Does the recurring rate include engineering, structural review, or design of the new asset? Does it include procurement and inventory of the new structure? Does it amortize the replacement cost of the new structure? Does it include construction costs associated with power supply? Does it provide a term length that allows a reasonable opportunity for a return on Verizon's investment? Does it include participation by the utility in the necessary conversation with the lighting customer (often a municipality)? Does it include maintenance of the streetlight infrastructure over the life of the asset?

The generic complaints by Verizon and Crown Castle are endemic to the challenges of streetlight collocation when carriers and infrastructure providers focus solely on "fees" without considering the other terms and conditions necessary to convert a streetlight into a mini cell tower. These generic complaints, and the unanswered questions those complaints beg, also illustrate why regulation of streetlight collocation—especially regulation akin to the current regulation of distribution pole wireline attachments—is impractical, unfruitful and ill-advised.

II. CONTRARY TO THE WIRELESS CARRIERS' CALL FOR STANDARDS-FREE DEPLOYMENT, THE COMMISSION SHOULD CONTINUE TO EXAMINE INDIVIDUAL ELECTRIC UTILITY STANDARDS ON A CASE-BY-CASE BASIS.

A. Crown Castle's Argument that All Electric Utilities Should Be Required to Adopt the Same Standards for Wireless Equipment is Contrary to Commission Precedent and the Pole Attachments Act.

Crown Castle argues that because some utilities allow certain attachment techniques, the safety and reliability concerns of utilities that disallow those techniques should be ignored:

> Indeed, contrary to the blanket bans by some utilities, nearly two-thirds of the utilities to which Crown Castle attaches its facilities permit the attachment of some equipment in the unusable space of a pole. This widespread deployment practice demonstrates the operational capabilities and safety of such attachments,

> undermining any blanket safety or climbing concerns voiced by investor-owned utilities for attachments in the unusable space on a pole.

Crown Castle Cmts. at 43. This argument is no more credible than an electric utility saying: "If our standards are acceptable to Verizon and AT&T, then they should be acceptable to Crown Castle as well."

The Commission has long recognized that each utility has the right to promulgate its own standards to reflect the specific conditions of its service territory and its individual experience and system characteristics. In the rulemakings immediately following the 1996 amendments to Section 224, the Commission stated:

> In addition to operating under federal, state, and local requirements, a utility normally will have its own operating standards that dictate conditions of access. Utilities have developed their own individual standards and incorporated them into pole attachment agreements because industry-wide standards and applicable legal requirements are too general to take into account all of the variables that can arise. A utility's individual standards cover not simply its policy with respect to attachments, but all aspects of its business. Standards vary between companies and across different regions of the country based on the experiences of each utility and on local conditions…As a result, each utility has developed its own internal operating standards to suit its individual needs and experiences….
>
> The record contains numerous factors that may vary from region to region, necessitating different operating procedures particularly with respect to attachments. Extreme temperatures, ice and snow accumulation, wind, and other weather conditions all affect a utility's safety and engineering practices. In some instances, machinery used by local industries requires higher than normal clearances. Particular utility work methods and equipment may require specific separations between attachments and may restrict the height of the poles that a utility will use…It is important that such variables be taken into account when drafting pole attachment agreements and considering an individual attachment request. The number of variables makes it impossible to identify and account for them all for purposes of prescribing uniform standards and requirements. Universally accepted codes such as the NESC do not attempt to prescribe specific requirements applicable to each attachment request and neither shall we.

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd. 15499, 16070-71 at ¶¶ 1148-49 (Aug. 1,

1996). Subsequently, in the 2010 Further Notice of Proposed Rulemaking preceding the adoption of the 2011 pole attachments order, the Commission stated:

> For the same reasons the Commission gave in 1996, we do not propose to adopt or endorse national engineering standards, however. We also reaffirm that "no single set of rules can take into account all of the issues that can arise in the context of a single installation or attachment."

In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd. 11864, 11876 at ¶ 24 (May 20, 2010) ("2010 FNPRM"). And most recently—just last year—the Commission stated:

> We decline the requests of certain commenters to establish limits on the construction standards and requirements that utilities adopt for their poles…. [O]ne-size-fits-all national pole construction standards (even if they were based on the NESC or similar codes) are not a good idea…

In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84, WT Docket No. 17-79, Third Report and Order and Declaratory Ruling, 33 FCC Rcd. 7705, 7772 at ¶ 133 (Aug. 3, 2018) ("2018 Order"). Even the NESC recognizes that variable local conditions may require differing construction requirements:

> For all particulars not specified, but within the scope of these rules, as stated in Rule 011A, construction and maintenance should be done in accordance with accepted good practice for the given local conditions known at the time by those responsible for the construction or maintenance of the communication or supply lines and equipment.

National Electric Safety Code ("NESC"), § 012C, at p. 1 (2007 ed.).

Crown Castle's argument, that all electric utilities should be required to allow pole mounted equipment below the communications space because some electric utilities allow it,

ignores the fact that each electric utility's service territory, system attributes and work practices differ. Crown Castle Cmts. at 43. For example, Oncor has a standard that disallows the mounting of certain wireless equipment below the communications space on Oncor poles (subject to certain exceptions). Oncor's policy is based upon its system conditions, work practices and its judgment regarding the systemic climbing hazard and fall hazard to electric linemen posed by pole mounted wireless equipment. Declaration of Stephen L. Barnes, attached hereto as Exhibit A, at ¶ 5.

Linemen are required to climb Oncor's distribution poles throughout its Texas service territory in order to access Oncor's distribution facilities. Ex. A at ¶ 6. In Tarrant County, Texas, where Fort Worth is located, over 50% of Oncor's poles must be accessed by climbing, as they are inaccessible via bucket truck. *Id.* There are areas of bucket truck inaccessibility in all parts of Oncor's service territory. *Id.* Although electric linemen are required by OSHA to wear fall restraint belts, manipulating the belt around certain types of equipment is extremely difficult and constitutes a safety hazard. *Id.* at ¶ 10. Navigating around equipment hazards significantly lengthens the time it takes a lineman to climb a pole. *Id.* at ¶ 11. This becomes a serious issue if the lineman is climbing the pole to rescue another lineman who is at the top of the pole and has been injured. *Id.* In addition, where a lineman is climbing multiple poles a day, navigating wireless equipment creates a situation where a lineman is more likely to be fatigued, lose concentration, and make a mistake that results in an injury. *Id.* Further, the manipulation of the safety belt that a lineman must perform when attempting to navigate around pole mounted equipment presents a potential danger to the lineman, as a mistake could result in an unrestrained fall. *Id.* at ¶ 12. In addition to constituting a climbing hazard/impediment, pole mounted equipment can present a fall hazard. *Id.* at ¶ 14. Any object a lineman strikes during a fall has the potential for lacerating, breaking, or severely bruising the body. *Id.*

Oncor's judgment regarding the climbing and fall hazards presented by certain types of pole mounted equipment does not mean that all electric utilities should adopt the same policy any more than the reverse would be true. It simply means that Oncor's system attributes, work practices and the judgment of "those responsible for the construction [and] maintenance" of Oncor's electric distribution system warrant this particular policy. NESC § 012C, at p. 1 (2007 ed.).

Crown Castle also argues that, if a utility has an exception to a standard requiring ground mounting of wireless equipment where the right-of-way authority does not allow for such ground mounting, the utility's safety concerns underlying its standard must be illegitimate:

> In some instances, utilities only allow attachment of equipment in the unusable space if the local government prohibits installation of the equipment on the ground in the right-of-way… While Crown Castle appreciates that this alternative is available, such policies are clearly not based on legitimate safety or engineering bases. The prohibition of ground-mounted equipment in the right-of-way has no relationship with the safety of these attachments in the unusable space on any given utility pole. Consequently, safety concerns cited by utilities in support of such policies appear unreasonable and unsupported on their face.

Crown Castle Cmts. at 43. Contrary to Crown Castle's assertions, such exceptions, which Crown Castle now attempts to use against electric utilities, are formulated by weighing the risks of such equipment against the need for access. Such exceptions involve the electric utility taking on additional risk in order to accommodate wireless deployment where there is truly no ground mounting alternative. Such exceptions also reflect that utilities are attempting through their standards to keep the safety hazards posed by equipment to a minimum, because the more such equipment there is system-wide, the greater the safety hazard posed. Under Crown Castle's logic, utilities would be better off had none of them ever allowed such equipment under any circumstances.

ExteNet argues that: "nowhere in Section 224 did Congress give utilities the right to declare that portions of a pole are *per se* off limits." ExteNet Cmts. at 8 (emphasis in original). This is not accurate. Section 224(f)(2) allows an electric utility to deny access "on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." There are clearly some parts of the pole that are off limits in **every** instance for one or more of these reasons, and this is the reason the NESC and a utility's individual distribution construction standards exist. The real issue here, which Crown Castle, ExteNet and CTIA have failed to properly frame, is this: where is the line drawn between permissible and impermissible "blanket prohibitions" against access to certain parts of the pole? Clearly some "blanket prohibitions" are acceptable and some are not. But unless the Commission backpedals on decades of precedent supporting an individual utility's right to maintain its own standards, then the only way the Commission can address this question is on an *ad hoc* basis.

Crown Castle further asserts that "…several utilities impose blanket prohibitions against pole-top antennas on poles supporting primary distribution lines, even though such attachments are permitted under the NESC with proper clearances." Crown Castle Cmts. at 45. Where an electric utility's standards allow antennas or equipment on certain types of poles but not others based on legitimate safety and reliability concerns, the electric utility's standards do not serve as a barrier to access and do not constitute a "blanket prohibition." In fact, they are standards that specifically **allow** for access with parameters that are defined clearly and upfront.

The real test for determining the lawfulness of any distribution construction standard should be whether the standard is **discriminatory**. The legal requirement, after all, is that utilities "shall provide a cable television system or any telecommunications carrier with non-

discriminatory access to any pole." The legal requirement is **not** that utilities allow access on terms and conditions most suitable to a cable television system or telecommunications carrier.

B. The Commission Should Decline Crown Castle's Request for a Rule Requiring that Electric Utilities Allow Meters on Distribution Poles.

Crown Castle argues that the Commission should declare that it is unreasonable for an electric utility to require that meters be mounted off pole:

> …For reasons that have never been fully clear to Crown Castle, some utilities prohibit the placement of their own meters on their poles, forcing attachers to place a meter pedestal in the public right-of-way or utilize unmetered service (when available). As noted above, local jurisdictions are reticent to grant permits for the placement of meter pedestals in the right-of-way… Clarification that restrictions of this nature are unreasonable and unsupported by the appropriate criteria would eliminate further congestion in the right-of-way and speed deployment timelines….

Crown Castle Cmts. at 43-44. However, those Electric Utilities that require pedestal mounting of meters do not allow **any** electric customers to attach meters on their distribution poles. For example, if an individual with a mobile home wished to attach a meter to the pole, that request would be denied, and the customer would be required to mount the meter off-pole. Electric utilities should not be required to adopt standards for wireless carriers that differ from those that apply to the rest of their electric utility customers. Other electric utilities, such as Georgia Power, do not allow pole mounted meters because meters are installed by a different craftsman than a lineman in a union shop, which means any time a pole is damaged (for example, car hit in the middle of the night), additional labor would have to be called to the restoration job if a meter was on the pole. Further, it would take longer to rewire the meter than it would just to replace the pole and transfer the other electric equipment. Service restoration times are of the utmost important to electric utilities (and closely regulated by state public service commissions), and electric utilities have the right under § 224(f)(2) to adopt such standards to protect the reliability of their systems.

C. ExteNet's Assertion that a Lack of Standards Would Speed Broadband Deployment Defies Logic.

ExteNet argues that "The Commission should reiterate that Section 224 does not allow utilities to impose blanket prohibitions on installing wireless equipment, whether for parts of poles or the entirety of poles" as such a lack of standards "ultimately promotes quicker deployment of wireless broadband facilities." ExteNet Initial Comm. at 7 & 8. To the contrary, electric utility standards actually help to speed deployment by setting clear expectations regarding (1) the category of poles on which wireless carriers can potentially attach, and (2) the acceptable dimensions and locations for placement of wireless equipment.

For example, Tampa Electric's Distributed Antenna System ("DAS") Crossarm Construction standard provides that DAS antennas and equipment may not be installed on poles with transformers. If Tampa Electric did not include that information in its standard and ExteNet was seeking to deploy on Tampa Electric's system, ExteNet would perform its field route review and plan its proposed route without the knowledge that transformer poles were not available for collocation. Next, ExteNet would submit its application. After reviewing the application for completeness and then performing its substantive engineering review, Tampa Electric would respond to ExteNet's application, denying permits for those poles with transformers. ExteNet would then have to conduct a new field review to determine alternative locations for the DAS equipment it had initially proposed to locate on the transformer poles. This massive waste of time can be avoided by clearly communicating wireless equipment standards up front.

D. The Commission Should Decline Crown Castle's Request for a Shot Clock Applicable to the Adoption of Standards for New Technology.

Crown Castle argues that electric utilities, whose business in the provision of electric service, should be more responsive in developing standards to meet rapidly evolving communications equipment configurations:

> Unfortunately, a number of the processes that are deemed essential by utilities to attachment and make-ready, such as the development of standards for new equipment configurations or the development of agreements to account for a new deployment methodology, are not subject to particularized timelines….
>
> Technology is ever evolving – that is one of the most exciting parts of the telecommunications industry. The Commission should clarify that the deployment of next generation technologies may not be unreasonably delayed by inadequate attention to this evolution by some utilities.

Crown Castle Cmts. at 50. Crown Castle's request seems to assume that an electric utility's infrastructure exists primarily for Crown Castle's use and benefit. Not so. The primary purpose of electric distribution poles is to provide safe and reliable electricity to customers. Every aspect of an electric distribution system is designed and built according to engineered standards. If there is not a standard that accommodates novel equipment proposed by an attacher, then the only options for the electric utility in responding to an application for such equipment are to either (1) reject the application or (2) state that the application cannot be approved until a standard is developed. Electric distribution construction standards are not developed overnight. They are the product of careful consideration, careful internal vetting, and executive review and approval. This detailed work that goes on behind the scenes creates the reliable distribution infrastructure upon which electric customers and communications attachers rely.

The Electric Utilities can appreciate that this is inconvenient for Crown Castle because Crown Castle is only concerned with the particular pole or poles on which it is attempting to deploy wireless equipment at any one time. However, as set forth in our initial comments, an electric

utility must consider the safety, reliability and engineering impact to the **entire** distribution network. And given the nondiscriminatory access obligation in Section 224(f), the Electric Utilities cannot afford to take the "seat-of-the-pants" approach urged by Crown Castle.

III. THE COMMISSION SHOULD REJECT REQUESTS TO OVERTURN CURRENT AND LONGSTANDING COMMISSION POLICY IN FAVOR OF NEGOTIATED SOLUTIONS.

A. In Seeking "Clarification" that Parties Cannot Negotiate for Terms and Conditions Outside the Pole Attachment Rules, CTIA Is Actually Asking the Commission to Overturn its Longstanding Policy in Favor of Negotiated Solutions.

As a preliminary matter, the Electric Utilities take issue with those commenters who characterize CTIA's request for declaratory relief as a "clarification" of the Commission's "prior holding that utilities are prohibited from seeking terms and conditions that conflict with the Commission's pole attachment rules." WIA Cmts. at 13; T-Mobile Cmts. at 24 ("the Commission should affirm its prior holding…"); ACA Connects Cmts. at 6; Crown Castle Cmts. at 49; ExteNet Cmts. at 8. By characterizing CTIA's request as one for "clarification" or "affirmation" of FCC precedent, the attaching entities are misrepresenting the Commission's longstanding policy on this issue, *i.e.*, that "parties are welcome to reach bargained solutions that differ from [FCC] rules." 2018 Order, 33 FCC Rcd. at 7711, ¶ 13; 2010 FNPRM, 25 FCC Rcd. at 11908, ¶ 107 ("As the Commission has previously stated, we 'encourage, support and fully expect that mutually beneficial exchanges will take place between the utility and the attaching entity.' We want to promote efforts by attachers and utilities to negotiate innovative and mutually beneficial solutions to contested contract issues."); *FCC Updates Pole Attachment Rules and Policies; Clarifications to Improve Accuracy; Marketplace Solutions Still Emphasized*, CS Docket No. 97-98, News, 2000 FCC LEXIS 1684, at *1 (Apr. 3, 2000) ("The FCC continues to emphasize the importance of private negotiations and marketplace solutions in resolving conflicts between utility companies

and various leasing entities."); *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Report and Order, 13 FCC Rcd. 6777, 6783-84 at ¶ 10 (Feb. 6, 1998) (the "1998 Order") ("The statute, legislative policy, administrative policy, and current industry practices all make private negotiation the preferred means by which pole attachment arrangements are agreed upon between a utility pole owner and an attaching entity.").

T-Mobile and ACA (like CTIA in its petition) cite to the following language in the 1998 Order to support their misunderstanding of Commission precedent: "a utility's demand for a clause waiving the [attacher's] right to federal, state or regulatory relief would be per se unreasonable and an act of bad faith in negotiation." 1998 Order, 13 FCC Rcd. at 6790, ¶ 21. This language, which is clearly limited to barring contract provisions that forfeit an attaching entity's right to seek relief, is inapposite here. And even if it was apposite, it would be superseded by the Commission's numerous statements supporting negotiated solutions since that time.

B. The Commission's Existing Remedies Are More than Adequate to Safeguard Against any Abuse During the Negotiations Process.

Attaching entities point to the "inadequacy" of the "sign and sue" remedy as grounds for a new substantive rule against contract provisions that differ from the Commission's rules. *See, e.g.,* Crown Castle Cmts. at 46-47; ExteNet Cmts. at 9-10. This is a radical departure from the general attitude of attaching entities towards the "sign and sue" remedy, which historically has been very favorable. *See, e.g.,* 2010 FNPRM, 25 FCC Rcd. at 11905-06, ¶ 100 (noting that "a number of attachers filed comments supporting the sign and sue rule…" and that the "Commission's willingness to review the reasonableness of contract provisions, in the view of some attachers, has served to check the utilities' abuse of their superior bargaining (sic) and encourage them to negotiate in good faith, thus reducing the incidence of disputes"); *In the Matter of Implementation*

of Section 224 of the Act; A National Broadband Plan for Our Future, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd. 5240, 5292-95 at ¶¶ 119-125 (Apr. 7, 2011) (acknowledging support by attaching entities for an unmodified "sign and sue" rule).

Crown Castle and ExteNet nevertheless contend that the "sign and sue" remedy is too "costly" and "time-consuming" to serve as an adequate remedy. *See* Crown Castle Cmts. at 46; ExteNet Cmts. at 9-10. Setting aside the fact that the record simply does not support these contentions, Crown Castle and ExteNet's arguments still lack merit because they ignore the other avenues for relief available to them under the Commission's procedures. For example, the Commission's procedures include a mediation process which the Commission, itself, describes as being less costly and less time-consuming than formal complaint proceedings:

> ***Mediation***
> By engaging in voluntary mediation, parties are able to focus on a mutually-satisfactory solution to the dispute and avoid costly and time-consuming litigation. Many cases that would have been adjudicated complaints have been resolved informally without further litigation as a result of the mediation efforts of MDRD staff.
>
> Before filing a formal section 208 complaint or a section 224 pole attachment complaint, the Division strongly encourages parties to attempt to settle or narrow the dispute on an informal basis….

See the Commission's Market Disputes Resolution Division webpage.[4]

Crown Castle also attacks the "sign and sue" rule on the grounds that it forces the Commission into the "position of essentially mediating agreements." Crown Castle Cmts. at 46. This argument misses the point. The Commission's role within the pole attachment context has always been that of a mediator/arbitrator that steps in when private negotiations fail:

[4] Can be accessed here: https://www.fcc.gov/general/market-disputes-resolution-division.

> The basic design of S. 1547 [i.e., the Pole Attachments Act], as reported, is to empower the Federal Communications Commission to exercise regulatory oversight over the arrangements between utilities and CATV systems in any case where the parties themselves are unable to reach a mutually satisfactory arrangement.… S. 1547, as reported, accomplishes this design in the most direct and least intrusive manner…
>
> […]
>
> Even in this instance S. 1547, as reported, does not contemplate a continuing direct involvement by the Commission in all CATV pole attachment arrangements. FCC regulation will occur only when a utility or CATV system invokes the powers conferred by S. 1547, as reported, to hear and resolve complaints relating to the rates, terms, and conditions of pole attachments. The Commission is not empowered to prescribe rates, terms, and conditions for CATV pole attachments generally.

S. REP. NO. 95-580, at 15 (1977); *see also* 2018 Order, 33 FCC Rcd. at 7712, ¶ 13 ("[Commission] rules provide processes that apply in the absence of a negotiated agreement, but we recognize that they cannot account for every distinct situation and encourage parties to seek superior solutions for themselves through voluntary privately-negotiated solutions."). Furthermore, if Crown Castle is concerned about the Commission being forced to become more actively involved in pole license agreement negotiations, then CTIA's requested relief is not the answer. As discussed *infra*, CTIA's requested relief will increase the Commission's involvement in the negotiation process significantly, which is contrary to Congress' intent as expressed in the Pole Attachments Act.

C. As Illustrated by Crown Castle's Comments, CTIA's Proposed Prohibition on Negotiated Solutions Is Unworkable.

As with many regulatory frameworks, the Commission's pole attachment rules are susceptible to alternative interpretations. CTIA's Petition clearly demonstrates this point. This point is also demonstrated by Crown Castle's comments, which cite to an unattributed or hypothetical limitation of liability provision and indemnification provision and imply that those provisions somehow violate an unspecified Commission rule. Crown Castle Cmts. at 47-48. The

interpretative nature of the Commission's rules renders CTIA's proposed prohibition wholly unworkable. Were the Commission to grant CTIA's requested relief, then in any subsequent negotiation for a pole license agreement, the parties to the negotiation would first have to determine whether the terms and conditions sought by each party were consistent with the Commission's "rules". That would require the parties to engage the Commission during the negotiation process—either through a complaint proceeding, petition for declaratory ruling, mediation, or otherwise—to resolve any competing interpretations of the Commission's rules. This would further complicate the negotiation process and unduly burden the Commission's limited resources—without any corresponding benefit to broadband deployment.

CONCLUSION

The Electric Utilities appreciate the opportunity to address these important issues and respectfully request that the Commission deny and dismiss CTIA's petition with respect to the Section 224 issues. CTIA's requested declaratory rulings not only would be contrary to precedent, but also would undermine deployment of the next generation of advanced communications facilities.

The Electric Utilities look forward to engaging further with the Commission on these important issues to ensure that the Commission facilitates, rather than undermines, the innovative solutions required for deployment of the next generation of advanced communications facilities.

Respectfully submitted this 20th day of November, 2019:

/s/ *Eric B. Langley*
Eric B. Langley
Robin F. Bromberg
R. Rylee Zalanka
LANGLEY & BROMBERG LLC
2700 U.S. Highway 280, Suite 240E
Birmingham, Alabama 35223
Telephone: (205) 783-5750
Email: eric@langleybromberg.com
robin@langleybromberg.com
rylee@langleybromberg.com

Counsel for Ameren Service Company, American Electric Power Service Corporation, Duke Energy Corporation, Entergy Corporation, Oncor Electric Delivery Company LLC, Southern Company and Tampa Electric Company

Exhibit A

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WIRELESS TELECOMMUNICATIONS BUREAU AND
WIRELINE COMPETITION BUREAU

In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment WIA Petition for Rulemaking, WIA Petition for Declaratory Ruling, and CTIA Petition for Declaratory Ruling	WT Docket No.: 19-250 WC Docket No.: 17-84 RM -11849

DECLARATION OF STEPHEN L BARNES

1. My name is Stephen L Barnes. I am currently employed by Oncor Electric Delivery Company as the Distribution Safety Manager.

2. As the Distribution Safety Manager, my duties include overseeing the corporate Safety Model for Oncor Electric Delivery Distribution.

3. Prior to my current position, I have over 25 years of experience with Oncor working in the field, including 15 years as a lineman.

4. I graduated high school in 1989. I began my career with Oncor in 1994. I completed the Apprenticeship program. I have been a Journeyman Lineman, Crew Supervisor, Operations Supervisor, Assistant District Manager, and now the Corporate Distribution Safety Manager.

5. I am submitting this declaration to provide information regarding two of the reasons behind Oncor's standard requiring the pad or pedestal mounting of equipment on the ground, not on Oncor's distribution poles (subject to certain exceptions): namely, that such equipment constitutes both a climbing hazard and a fall hazard.

6. Linemen are required to climb Oncor's distribution poles throughout its Texas service territory in order to access Oncor's distribution facilities. In Tarrant County, Texas, where Fort Worth is located, over 50% of Oncor's poles must be accessed by climbing, as they are inaccessible via bucket truck. There are many reasons why a particular pole or pole line is not accessible by bucket truck, including but not limited to: (1) the pole line is back lot distribution over an easement into which a bucket truck cannot drive, (2) trees or vegetation are so thick the bucket truck cannot reach the electric facilities; and (3) the placement of a fence on private property is such that a bucket truck cannot access electric facilities on the pole. Although Tarrant County has the least number of bucket truck accessible Oncor poles, there are areas of bucket truck inaccessibility in all parts of Oncor's service territory.

7. For poles that are not bucket truck accessible, electric lineman must climb Oncor's distribution poles to perform any tasks that must be accomplished with respect to Oncor's electrical facilities on the pole, including installation, maintenance, and removal of such equipment.

8. Equipment attached below the communications space on a distribution pole constitutes a climbing hazard. A lineman climbing a pole must navigate through and over that equipment both when ascending *and* descending the pole.

9. Electric linemen are required by OSHA to wear fall restraint belts. Navigating past wireless equipment is more difficult and takes more time when a lineman is wearing a fall restraint belt than if he was free-climbing a pole.

10. The fall restraint belt has two primary components: (1) a "choker" that goes around the pole and attaches to the lineman's belt via a D-ring and (2) a temporary fall restraint lanyard that can be engaged when the choker cannot be engaged. When a lineman is climbing an unobstructed pole, the lineman climbs up the pole with the choker engaged and supporting the

lineman's weight. If the lineman loses his footing, the choker pulls tight around the pole and prevents the lineman from falling more than a few inches to a foot. On a pole with equipment attached, when the lineman encounters the equipment, the lineman must unclip the choker from his belt and remove the choker from the pole, as the choker cannot slide over the equipment that protrudes off of the pole. The lineman must then place his temporary fall restraint lanyard above the piece of equipment and pull himself up and over the wireless equipment. Once he has cleared the equipment, he must then remove the lanyard and re-attach the choker. Where there are multiple pieces of equipment on the pole, the lineman must repeat this process for each piece of equipment. Where the pieces of equipment are not spaced enough apart for the lineman to insert the lanyard between them, then this poses a safety risk. The process applies both when ascending and descending the pole. Navigating around equipment on the pole using the fall restraint belt is extremely difficult.

11. Navigating around equipment hazards while wearing a fall restraint belt significantly lengthens the time it takes a lineman to climb a pole. This becomes a serious issue if the lineman is climbing the pole to rescue another lineman who is at the top of the pole and has been injured. Minutes are critical when trying to resuscitate breathing or heartbeat in a lineman who has suffered an electric shock. The longer it takes to get the lineman to the ground by rope, the longer the time before CPR can begin. In addition, where a lineman is climbing multiple poles a day, and must navigate around equipment on multiple poles, the difficulty of this task is multiplied and creates a situation where a lineman is more likely to be fatigued, lose concentration, and make a mistake that results in an injury.

12. Further, the fact that a lineman must remove his choker when going over equipment presents a potential danger. While the lineman still has the temporary lanyard he can use to

continue to ascend or descend the pole, if the lineman makes a mistake when removing the choker and attempting to engage the temporary fall restraint lanyard, the lineman may suffer an unrestrained fall from the pole. Where there are multiple pieces of equipment on the pole, each transition of removing the choker, engaging the temporary restraint, and then reengaging the choker multiplies the potential hazard to the lineman.

13. Because of the serious climbing hazard to linemen posed by pole-mounted equipment, Oncor's requirement that metering equipment be pad or pedestal mounted is not confined to wireless carriers. For example, Oncor does not allow meters to be mounted on its poles by any customer, including a core electric customer, such as a mobile homeowner.

14. In addition to constituting a climbing hazard, equipment on the pole is also a fall hazard. When a lineman loses his grip and gravity takes over, any object he strikes in his fall has the potential for lacerating, breaking, or severely bruising the body, whether the object has a sharp corner or a smooth corner, and whether it is made of something breakable like hard plastic or glass. Soft tissue, such as the eye, is especially vulnerable in such a fall. Injuries that result from encountering equipment can be not just temporary injuries, but life changing injuries. While lineman wearing fall restraint belts are less likely to be injured by equipment in a fall, lineman in bucket trucks are at risk of being injured by pole mounted equipment if they fall from the bucket.

Executed on the 15th day of November, 2019.

Stephen L Barnes
Distribution Safety Manager
Oncor Electric Delivery Company LLC